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**IN THE  
COURT OF APPEALS OF INDIANA**

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FRANK POLSTON,

Appellant-Respondent,

vs.

DONNA JEAN POLSTON,

Appellee-Petitioner.

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No. 73A01-0611-CV-511

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APPEAL FROM THE SHELBY CIRCUIT COURT  
The Honorable Charles D. O'Connor, Judge  
Cause No. 73C01-0509-DR-112

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**October 29, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Frank Polston appeals the order dissolving his marriage of twenty-nine years to Donna Jean Polston. Frank claims the court abused its discretion when it divided the marital estate equally and declined to award him spousal maintenance. We affirm.

### **FACTS AND PROCEDURAL HISTORY**

Frank and Donna married in 1979. When they married Frank owned a house where they lived for seven years. In 1991, they sold the house for \$41,000 and used the proceeds as a down payment on the marital residence they owned at separation. The court valued the marital estate at \$208,352.50, with \$164,051 representing the marital residence.

Both parties worked throughout the marriage. In 2002, Frank became disabled and began receiving Social Security Disability Benefits. He receives a tax-free payment of \$375 per week from the Social Security Administration. Donna works at Wal-Mart and makes \$343 per week after taxes.

The court divided the marital estate equally and declined Frank's request for spousal maintenance.

### **DISCUSSION AND DECISION**

Where, as here, the trial court entered findings of fact to support its judgment, we will not set aside those findings unless they are clearly erroneous. *Augsburger v. Hudson*, 802 N.E.2d 503, 508 (Ind. Ct. App. 2004). We may not reweigh the evidence or reassess the credibility of the witnesses. *Id.* at 509.

1. Division of Assets

The court did not abuse its discretion in dividing the marital assets equally.

Regarding the division of assets, Indiana law provides:

The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

- (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
- (2) The extent to which the property was acquired by each spouse:
  - (A) before the marriage; or
  - (B) through inheritance or gift.
- (3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.
- (4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.
- (5) The earnings or earning ability of the parties as related to:
  - (A) a final division of property; and
  - (B) a final determination of the property rights of the parties.

Ind. Code § 31-15-7-5.

The court entered the following findings regarding division of the marital estate:

- 6) The Court has considered the factors set forth in IC 31-15-7-5 and specifically finds:
  - a) Each party contributed to the acquisition of the marital estate property during the 26[-]year marriage. [Frank] was the principal income earner; [Donna] worked as a waitress, as a retail sales clerk, cleaned homes and was a homemaker.
  - b) The marital residence was acquired in part with approximately \$40,000.00 [Frank] received from the sale of a residence he owned prior to the parties' marriage.
  - c) [Frank] is totally disabled and unable to work; his only source of income is Social Security Disability. He receives a net monthly check of \$1,611.00 or \$375.00 per week. [Frank] is covered by

Medicare hospital and medical insurance, the cost of which is deducted from his monthly benefit in arriving at the sum of \$1,611.00.

d) [Donna] is employed full time at Wal-Mart and earns \$10.73 per hour for a 40[-]hour week; she is not under-employed. Her average weekly gross income is \$429.00; her average weekly net or disposable income is \$343.00.

e) [Frank] received a lump sum award of \$29,338.00 in April, 2003; currently, \$16,866.00 of that award remains in [Frank's] Maxsaver Account.

\* \* \* \* \*

8) While [Frank] seeks a deviation from the presumptive 50-50 or equal split of the marital estate, and makes a somewhat persuasive argument premised upon his disability and his initial contribution to the purchase of the marital residence, the Court finds that [Frank] has a substantial portion of his initial lump sum disability award in a savings account. The Court acknowledges that he purchased [Donna's] IRA (\$7,257.00). The parties' disposable incomes after the marriage is dissolved and the division of the marital estate becomes effective, are relatively close. The Court finds that [Donna's] contributions to the acquisition of the marital estate, through income and her efforts as a homemaker, were significant.

\* \* \* \* \*

10) The Court finds that an equal division of the marital estate is fair and equitable, and awards [Donna] the following assets:

[List of assets totaling \$18,223.00]

11) The Court awards [Frank] the following assets:

[List of assets, including marital residence, totaling \$190,129.50.]

12) To equalize the division of the marital estate, the Court enters judgment for [Donna] and against [Frank] in the amount of \$85,593.00, which shall not bear interest for a period of 180 days. . . .

(Appellant's App. at 7-10.)

Frank claims the evidence does not support finding Donna "contributed significantly to the acquisition of the marital assets," because "Donna worked sporadically and did not make as much as Frank." (Appellant's Br. at 7.) While Donna may not have worked as consistently or at jobs that paid as well as Frank's, we will not find an abuse of discretion in the court's finding her contributions were "significant"

because she contributed “to the acquisition of the marital estate, through income and her efforts as a homemaker.” (Appellant’s App. at 8-9.) *See* Ind. Code § 31-15-7-5(1)(“ . . . regardless of whether the contribution was income producing.”)

Neither does the court’s order support Frank’s allegation the court “seemed to ignore the economic circumstances of the parties.” (Appellant’s Br. at 7.) While Frank is correct that the court’s order does not mention their emancipated son lives with Frank, Frank has not explained how that son’s presence impacts Frank’s financial situation. Nor has Frank explained why evidence Donna has a roommate should impact the division of marital assets.

It is clear to us the trial court considered all the evidence before it and attempted to divide the assets between these parties in a just and reasonable manner. We find no abuse of discretion in the court’s conclusion that Frank did not rebut the statutory presumption that an equal division of assets was appropriate.

## 2. Spousal Maintenance

Frank also asserts the court abused its discretion by denying him spousal maintenance. It did not.

A court “may order maintenance in . . . final dissolution of marriage decrees.” Ind. Code § 31-15-7-1. “If the court finds a spouse to be physically or mentally incapacitated to the extent that the ability of the incapacitated spouse to support himself or herself is materially affected, the court may find that maintenance for the spouse is necessary during the period of incapacity . . . .” Ind. Code § 31-15-7-2(1). The trial court has complete discretion to determine whether to award maintenance. *Augsburger*, 802

N.E.2d at 508. We may not reverse unless the court's decision is "clearly against the logic and effect of the facts and circumstances of the case." *Id.* We presume the court correctly applied the law. *Id.*

The court entered the following findings in rejecting Frank's request:

13) Although [Frank] is physically handicapped to the extent that his ability to support himself is materially affected, an award of maintenance is not mandatory. The Court must consider the resources of the spouse from whom maintenance is requested. A grant of maintenance is optional, within the discretion of the Court. Axom v. Axom, 565 N.E.2d 1097 (Ind.Ct.App.1995). The Court has previously determined that the parties' disposable incomes are relatively close. Additionally, [Donna] does not have substantial assets with which to pay a maintenance obligation.

14) The Court also acknowledges that [Frank's] disability payments to be received in the future are not marital property subject to division but should be considered as payments to replace [Frank's] future lost income. Severs v. Severs, 813 N.E. 2d 812 (Ind.Ct.App.2004)[, *trans. granted* 837 N.E.2d 498 (Ind. 2005)].

15) Respondent's request for maintenance is denied.

(App. at 11.)

To support his argument, Frank quotes our supreme court:

Where a trial court finds that a spouse is physically or mentally incapacitated to the extent that the ability of that spouse to support himself or herself is materially affected, the trial court should normally award incapacity maintenance in the absence of extenuating circumstances that directly relate to the criteria for awarding incapacity maintenance.

*Cannon v. Cannon*, 758 N.E.2d 524, 527 (Ind. 2001). That language was *dicta*, as the trial court in *Cannon* found the wife was not incapacitated. Moreover, there are "extenuating circumstances" in this case – Frank's weekly net payment from the Social Security Administration is more than Donna makes working forty hours per week at Wal-Mart. Because Frank has higher net income than Donna and nearly \$17,000.00 more in

savings,<sup>1</sup> we find no abuse of discretion in the court's denial of Frank's request for spousal maintenance.

Affirmed.

SHARPNACK, J., and BAILEY, J., concur.

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<sup>1</sup> Frank asserts: "Once the wife receives her judgment in the lump sum of \$85,953.00, she will have 'substantial assets with which to pay a maintenance obligation.'" (Appellant's Br. at 9.) Presumably if Frank sells the marital residence to obtain that money for Donna, he too would have approximately \$80,000 more in savings. Thus, their relative economic circumstances will remain unchanged, and we see no abuse of discretion.